

(1996) 12 MAD CK 0088

In the Madras High Court

Case No : Civil Revision Petition No. 2534 of 1996

Metallurgical and Engineering Consultants (India) Ltd., Hinoo,
Ranchi - 834 002

APPELLANT

Vs

AICAM Engineering Ltd. No. Y.211, 2nd Avenue, Anna Nagar,
Madras-40, State Bank of Travancore, 162, Mount Road,
Madras-2 and UCO Bank, 169, Thambu Chetty Street,
Madras-1

RESPONDENT

Date of Decision : 18-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1

Citation : (1996) 12 MAD CK 0088

Hon'ble Judges : N. Arumugham, J

Bench : Single Bench

Advocate : T.V. Ramanujam, for M/s. M.R. Raghavan and K. Vasu Venkat, for the Appellant; Mohan Parasaram, Advocate for the 3rd Respondent, for the Respondent

Judgement

N. Arumugham, J.—This revision was sought to be admitted to challenge the propriety and legality of the order passed by the lower Appellate Court, namely, the II Additional Judge, City Civil court, Madras, in C.M.A. No. 133 of 1996 dated 2.9.1996, granting temporary injunction against the revision petitioner from invoking the bank guarantees given by the first respondent herein, as the said relief was rejected by the trial court. M/s. Metallurgical and Engineering Consultants (India) Limited, a Public Undertaking being owned by the Government of India entered into an agreement of performance dated 4.8.1993 for the expansion work of the Rourkela Steel Plant for certain ascertained considerations, and for which various terms and conditions agreed among themselves were reduced into writing on 4.8.1993, filed before the Court below. According to the revision petitioner herein, the respondent M/s. AICAM Engineering Limited, for the due performance of their work and the receipt of the various consideration arising therefrom had obtained 9 bank guarantees

furnished by M/s. State Bank of Travancore, Mount Road, Madras and UCO Bank, 169 Thambu Chetty Street, Madras, for the total sum of Rs. 2,62,70,000/-. though work started, commenced and was carried on, according to the revision petitioner, one of the parties. to the agreement, the other party, M/s. AICAM Engineering Limited have not fulfilled their part of the obligations and conditions and left the work in the middle and thus committed breach of contract. It was because of the said reasoning, the revision petitioner made every effort to invoke the bank guarantees furnished by the bank on behalf of the first respondent. It was at this stage, the first respondent has come forward and filed a suit O.S. No. 7644 of 1996 on the file of the XII Assistant Judge, City Civil Court, Madras, for the relief of injunction and in I.A. No. 9009 of 1996 prayed for the grant of injunction restraining the revision petitioner herein from invoking the bank guarantees on more than one ground. He also filed another application to maintain the status-quo as on that day but for a temporary period it was granted but however, no injunction order temporary, in nature was passed by the trial Court. On hearing both sides, on considering the merits, the trial court dismissed both the applications and aggrieved at this, the first respondent preferred C.M.As.131 and 133 of 1996 before the lower Appellate Court and on a reconsideration of the matter, the lower Appellate Court dismissed C.M.A.131 of 1996 and allowed C.M.A. 133 of 1996 on merits and consequently, granted interim injunction and thus restrained the revision petitioner from invoking the bank guarantees by passing the impugned order. It is this order being sought to be challenged in this revision and on ordering notice of motion, I have had the occasion to hear the bar for the respective parties with respect to factual and legal aspects of the case.

2. Mr. T.V. Ramanujam, learned senior Counsel appearing for the revision petitioner, dwelt his attack upon the impugned order on the basis of the well settled position on this score, namely, that for the due performance of a contract or agreement, for and on behalf of one of the parties to the value of the same, if a banking institution furnished an unconditional bank guarantee to any person, undertaking to pay the amount of the guarantee on behalf of one of "the parties to the contract, namely, the obligor, to pay the amount without any objection or any demur whatever it is, then, the stopping or interfering with the invoking of such bank guarantee by a court of law is not at all to be allowed for the reason of its unconditional nature and it is also totally against the spirit and norm of the trade practice. While being so, learned Senior Counsel would urge that the first respondent being a party to the contract above referred, had since failed to perform its obligation in full, it entitles the petitioner to invoke the bank guarantees, which are unconditional in nature and that therefore, and in lieu of the terms of the bank guarantee, as per the settled law, the injunction granted by the lower Appellate Court cannot at all be maintained and such, this revision ought to be allowed and the impugned order set aside.

3. Controverting the said contentions, Mr. Mohan Parasaran, learned counsel appearing for the first respondent submitted that the non performance of the

contract entered into between the first respondent and the revision petitioner was not admitted and that even if any, it was beyond the control and capacity of the first respondent and that therefore the remedy open to the revision petitioner on the basis of equities is certainly not to invoke the bank guarantees and that accordingly, the revision petitioner is not entitled to invoke the bank guarantees which though are unconditional in nature and by saying so and placing reliance on certain authorities, justified the impugned order passed by the lower Appellate Court.

4. In the context of the above position, the only point that arises for consideration is whether the impugned order passed by the lower Appellate Court has become vitiated with any illegality or impropriety, and if so, liable to be set aside.

5. It is not in controversy that the agreement had been entered into on 4.8.1993 with all its terms and conditions and that in pursuance of the same, both the revision petitioner and the first respondent had commenced the work along with the payments made to the extent of the amounts-referred to therein and for the due completion of the work, two banks by name State Bank of Travancore and UCO Bank, Madras, on behalf of the first respondent furnished nine bank guarantees, which are unconditional in nature. The Bar for the respective parties are also not at any dispute that the said guarantees to the extent of Rs. 2,62,70,000/- is payable on demand by the revision petitioner or on his behalf without any objection or demur whatsoever. It is the case of the first respondent herein that the breach of the contract as alleged by the revision petitioner was not correct and in any event, he cannot be attributed with any accountability and that therefore, equity demands the revision petitioner to refrain from invoking the bank guarantees.

5.1 The Supreme Court in Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal and Co. (Engineers) Pvt. Ltd., , has held as follows:

"Where a bank unconditionally agreed to pay to party to whom guarantee was given to pay on demand sums specified therein and amount specified was to be paid without demur and without requiring creditor, beneficiary, to invoke legal remedy and there was a specific provision that beneficiary was to be sole judge as to whether party furnishing guarantee has committed breach of contract and as to extent of loss and damages and decision of the beneficiary as to amount was final and binding, the order of Court restraining beneficiary from enforcing guarantee till disposal of proceedings pending before arbitrator as to disputes between beneficiary and party furnishing guarantee was illegal and without jurisdiction,"

5.2 The Apex Court in National Thermal Power Corporation Ltd. Vs. M/s. Flowmore Private Ltd. and another, had observed in this regard as follows:

"A Bank guarantee which is payable on demand implies that the bank is liable and when a demand is made upon the bank by the beneficiary. The bank is not

concerned with any inter se disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee. All the three bank guarantees which have been invoked are payable on demand. There is, therefore, no merit in the submission that the bank guarantees have not been properly invoked."

6. In U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers (P) Ltd., , Their Lordship Sabysachi Mukharji, J. has held as follows:

"This was not a case in which injunction should be granted. The net effect of the injunction is to restrain the bank from performing the bank guarantee. That cannot be done. One cannot do indirectly what one is not free to do directly, but a maltreated party in such circumstances is not remedy less. The respondent can sue the appellant for damages. There was no apprehension that irretrievable damages would be caused. Nor was any strong prima facie case of fraud in entering into a transaction made out.

Commitments of banks must be honoured free from interference by the courts. An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with. In order to restrain the operation either of irrevocable letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardised. Upon bank guarantee revolves many of the internal trade and transactions in a country."

In the same ruling, Their Lordships Jagannatha Shetty, J. has observed as follows:-

"In modern commercial transactions, various devices are used to ensure performance by the contracting parties. The traditional letter of credit has taken a new meaning. In business circles, stand-by letters of credit are also used. Performance bond and guarantee bond are also the devices increasingly adopted in transactions. The Courts have treated such documents as analogous to letter of credit.

"Bank Solvency and Guaranty Letters of Credit". Stanford Law Review, V, 25,1972-73, p.719 referred to.

Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in a case of fraud. But, the banker must be sure of his ground before declining to pay. The fraud should be of an "egregious nature as to vitiate the entire underlying transaction." It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the

fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the Court for an injunction. The Court; however, should not lightly interfere with the operation of irrevocable documentary credit. The sound banking system may require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the Court to come to their rescue with injunctions unless there is established fraud."

7. Adverting to the legal ratios enunciated by the Apex Court and applying the same to the facts of the instant case, I have no hesitation to hold that the nine bank guarantees given by M/s. UCO Bank and the State Bank of Travancore for the total sum of Rs. 2,63,70,000/- in the name of the beneficiary, the revision petitioner, is an unconditional one payable on demand without any demur or objection or other thing whatsoever. If this is the position, then, the restraint order passed by the lower Appellate Court cannot be sustained for a moment as it vitiates the settled principles of law.

8. However, Mr. Mohan Parasaran, learned counsel appearing on behalf of the first respondent, tried to distinguish the unconditional guarantee given in all the nine bank guarantees on the ground of equities made available in favour of the first respondent. Reliance was also placed upon a case law held in Larsen and Toubro Limited Vs. Maharashtra State Electricity Board and others, for the following ratio;

"In case of bank guarantee for security against advance payment, which was sought to be invoked by respondent in time by making a request by a letter to extend Validity of the guarantee for further 6 months and if not so extended, to treat the communication as notice for encashment, held in view of dispute pending before arbitrator, Court below was justified in declining to grant injunction against invocation of the guarantee. But in case of conditional guarantee for partial release of retention money, which was to ensure only till successful completion of trial operations and taking over of the plant, held, that event having ensued, the guarantee was not encashable on its terms and in order to prevent irretrievable injustice, injunction must issue. However, in case of guarantee for release of partial retention money which was unequivocal and unconditional, held, no case of fraud or irretrievable injustice made out justifying grant of injunction."

9. It was also brought to my notice a judgment rendered by me in M/s Deltech Engineering Pvt. Ltd. v. Rishi Carbonics Pvt. Ltd. and another (1991-2-L.W. 177) in which, I had the occasion to observe the following on the particular facts of that case:

"The bank guarantee in question threatened to be invoked by the first respondent is not an unconditional guarantee to be invoked at any time at the

option of the beneficiary as laid down by the Apex Court of our country as well as this Court. But, this is a guarantee burdened with the conditions agreed upon by the beneficiary as a sine qua non to invoke the same on the breach, if any, by giving notice and providing a reasonable opportunity to rectify the same and that even so the first respondent was never inclined to comply and to refer the alleged dispute, if any, for the arbitration as agreed. Therefore the ad-interim injunction granted by this Court in favour of the applicant on 21.2.1991 is made absolute till the disposal of the suit."

10. In *The State Trading Corporation of India Ltd. Vs. Jainsons Clothing Corporation and another*, the Supreme Court, has held as follows:

"The contract of guarantee is a trilateral contract which the bank has undertaken to unconditionally and unequivocally abide by the terms of the contract. It is an act of trust with full faith to facilitate free flow of trade and commerce in internal and international trade or business. It creates an irrevocable obligation to perform the contract in terms thereof. On the occurrence of the events mentioned therein, the bank guarantee becomes enforceable. The subsequent disputes in the performance of the contract does not give rise to a cause nor is the Court justified on that basis to issue an injunction from enforcing the contract i.e., bank guarantee. The parties are not left with no remedy. In the event of the dispute in the main contract ends in the party's favour, he is entitled to damages or other consequential reliefs. The Court should normally insist upon enforcement of the bank guarantee and the Court should not interfere with the enforcement of the contract of guarantee unless there is a specific pleas of fraud of special equities in favour of the plaintiff, he must necessarily plead and produce all the necessary evidence in proof of the fraud in execution of the contract of the guarantee, but not the contract either of the original contract or any of the subsequent events that may happen as aground for fraud."

The above legal ratio would squarely apply to the facts of the instant case in all the four. Nonetheless, the very endeavor of Mr. Mohan Parasaram, learned counsel, in laying stress on the mere pleading of fraud or the special equity in reducing the original contract amount into another figure or the works done by the first respondent, is not impressive and cannot at all be inferred from any tangible evidence with regard to the concept of "fraud" in the instant case. Mere putting the word "fraud" in the pleadings does not amount to actual fraud. "Fraud" played means actual fraud must have taken place for obtaining the bank guarantee or unconditional letter of credit by the beneficiary and for which, there must be, substantive evidence or if not, substantive proof and specific pleading and that is, what is required by law. Though a name sake fraud is pleaded, I am totally unable to see as to how the nine bank guarantees in this instant case have been obtained by fraud or fraudulent representation or what sort of equities are available in favour of the first respondent plaintiff-herein, so as to enable the Court to sustain the impugned order of injunction. In the absence of any tangible pleading leading to the fraud or the equities in favour of the first respondent. I

am at every difficulty to give the benefit of the above ratio as contended by Mr. Mohan Parasaran.,

11. As I have already adverted to, the element of fraud and equities in this case have not been established and I have not been shown a condition existing prima-facie even. On the other hand, to weigh the position, keeping in just a position the pleas on behalf of the respective parties, it is seen that the nine bank guarantees in question in the instant case are unconditional in nature, unequivocal and the banks have agreed to pay on demand, when it is made, on behalf of the beneficiary, without any demur or objection whatsoever. The remedy, if at all open for the first respondent plaintiff, is as pointed out by the Supreme Court in the above case law relied on by Mr. Mohan Parasaran, otherwise, and not by way of seeking shelter under Order 39 Rule I of the Code of Civil Procedure. For the said reasonings, I am totally unable to persuade myself to accept the contentions raised by Mr. Mohan Parasaran, learned counsel and with great respect, I reject every one of the same, which would mean, I find that there is every force and substance in the (sic) (arguments projected by Mr. T.V. Ramanujam, learned Senior Counsel. Having gone through the matter in its breadth and length with the case records and the case law, I am convinced that this is not a case for granting any injunction restraining the invoking of the bank guarantees by the beneficiary, namely, the revision petitioner. Accordingly, the impugned order passed by the lower Appellate Court became vitiated and it cannot be sustained. In the result, for all the foregoing reasoning and findings, the revision is admitted and allowed. Consequently, the impugned order passed by the II Additional Judge, City Civil Court, Madras, in C.M.A. No. 133 of 1996 dated 2.9.1996 is set aside and the injunction granted is cancelled forthwith. There will be no order as to costs for either of the parties under the circumstances.